No. 21697

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING FOR THE APPELLANT

William Braly Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204

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TO THE HONORABLE KOELSCH AND DUNIWAY, CIRCUIT JUDGES, AND PREGERSON, DISTRICT JUDG
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Converse respectfully petitions for rehearing to clarify and correct the decision of August 19, 1968.

Without compliance with the statutes upon which their jurisdiction was made t depend, the Forest Service had no jurisdiction to initiate and the Department of t Interior had no jurisdiction to prosecute Converse. Should this Court disregard safeguards enacted to limit agency jurisdiction and power in prosecutions under 30 U.S.C. 613? Administrative jurisdiction and power cannot be created or enlarge by the courts in the proper exercise of their judicial functions. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587. To do so would deny "Due Process of Law" under the Fifth Amendment to the Constitution of the United States

Constitutional "Due Process" with respect to the exercise of agency jurisdiction and power is implemented in our case here by statute, 30 U.S.C. 613, the Administrative Procedure Act, which prohibits process except in the manner authorized by law, 5 U.S.C. 1005(b) 1008(a), and Agency Regulations 43 CFR 221, Subsections 54, 63 and 68. Do the procedural provisions of these statutes and these

The District Court found, as a matter of fact, agency noncompliance with conditions upon which agency jurisdiction is made to depend under 30 U.S.C. 613, i.e. (a) "No request for publication was accompanied by the required certificate of title or abstract of title;" R43 (b) "A copy of the publication was not served or the mining claimant as demanded by Statute;" R 43 (c) No agency complaint apprize Converse of the charges brought against him.

We are not unaware of Executive Power to take over all mines at will should he conclude that there is an economic or financial crisis for lack of gold or lack of silver or lack of other metals. Executive Order No. 10997 and No. 11051. But until the Executive does so, the Secretary should be required to comply with mandatory statutes upon which his jurisdiction and authority depend.

"Due Process" was denied Converse. Requests for leave to make offers of proo under the rule as to Walcott (Tr 174), Converse (Tr 24, 25), Suchy (Tr 58-61) and Persons (Tr 143, 148), were denied by the Hearing Examiner. Exceptions to the rulings of the Hearing Examiner were taken. (Tr 148-150).

> Mr. Murray: "It's tantamount to a denial of due process to refuse to permit a Mining Claimant in a proceeding of this kind the right to introduce his evidence. Certainly, it might be objectionable evidence in the view of the Examiner, but, in the view of a reviewing body on appeal, it might be deemed proper evidence. But to prohibit the Mining Claimant from making his record, certainly, is a denial of due process."

It was the duty of Converse to obey the rulings of the Hearing Examiner and refrain from stating in the record what he proposed to prove. His remedy was to appeal.

In Downie v. Powers et al, 193 F 2d 760 (10th Cir. 1951), it was held that the spirit of the mandate of the Rule 43(c), 28 USCA, permitting offers of proof of excluded testimony to be made for the record cannot be ignored. The purpose

of the rule permitting the examining attorney to make a specific offer of what he expects to prove by the witness' answer to an excluded question is to enable the examining attorney to make such a record that an Appellate Court can determine whether there was reversible error in excluding the question. See Moore's Federal Practice, Vol. 3, p. 3076.

In Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Nicholas, 253 Fed 504, the Court said:

> "Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course, any evidence they wish to tender that would tend to establish their defenses should be received by the Court, and as to any which the Court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement so that the Appellate Courts can intelligently pass upon the challenged rulings of the Court."

The Court may wish to correct what appears to be unwarranted agency assumptions before finally fixing its stamp of approval to them. The statement that "Converse still has his claims, can work them and apply for patent" is based on the erroneous assumption that the lands could not be withdrawn from mineral entry. The Secretary can withdraw them from entry anytime he wishes unless there has been a valid mineral discovery. Indeed, it is unrealistic to assume that any citizen would risk capital subject to loss at the whim of the Secretary.

In applying tests for discovery the Secretary erroneously assumed that the economics of 1910 were the same as the economics of 1955, the year in question. Agency findings that base metals were discovered in the Quartzville District make invalid the inference that there are no base metals in the district. The erroneous assumption that the claims were inaccessible in 1955 before the Forest

Converse offered the testimony of four Geologists. Two of these had earned doctorates, one, with a master's degree, had worked with the United States Geological Survey, the fourth had had much experience in prospecting. In addition, Converse offered the testimony of a mining man employed by the United States Department of Agriculture and that of a prospector who had had thirty years' experience. All testified that the lodes discovered on the Edith and Paymaster Claims consist of sulfide minerals in quantities sufficient to justify a prudent man in spending time and money to develop the claims.

Forestry offered testimony of Mr. Suchy as to the Edith and that of Mr. Holmgren as to the Paymaster. Forestry offered no rebuttal of mining claimant's testimony. Mr. Suchy testified that the discoveries of mineral on the Edith justified a prudent man in spending time and money to explore the ore body discovered to determine its extent. He testified that a prudent man would be justified in exploring the claim. The work he said he would do included development work. He advised Mr. Converse to spend time and money on the claim.

In this review of administrative proceedings, we have not asked the courts to weigh the evidence. No matter how heavily the evidence weighs in favor of the Mining Claimant, the Hearing Examiner has the power to reject it. And the Courts are bound by his findings if these are supported by any evidence. If we accept the conclusion that no discovery had been made as being a ultimate finding of fact, although specific findings of fact establish the contrary, then the Secretary could invalidate any mine by this method, no matter how rich, for want of discovery.

We have tried to make clear that we are concerned here with findings of basi facts which establish that discoveries were made, as distinguished from findings of ultimate fact. If the findings of basic facts contradict the finding of ultimate fact or conclusion, then the conclusion has no validity.

As requested by Converse, the Hearing Examiner made basic findings of fact

with respect to the area on the Edith exposed by Converse before July 23, 1955. The Examiner found that sulfide mineralization was discovered in a lode. Samples of the lode assayed high mineral values. Requested findings Nos. 3, 5, 7 and 12. It was stipulated that Exhibit 34 contained 60% lead and 20% zinc (Tr 221, 222). A sample on assay certificate, Exhibit 1, showed 61.2% lead and 35% copper. Another sample contained .12 ox gold, 43% lead and 4.15% copper. The first sample was valued at $150 per ton; the second sample was valued at $31.86 per ton. Finding No. 5. The findings establish that the average values were several times the value of similar ores mined in the United States. (Tr 117, 118).

These facts show no resemblance to the kind of property described in United States v. Iron Silver Mining Co., 128 U.S. 673, where mere indications of mineralization in lodes which could not be clearly ascertained did not evidence discovery The Converse claims did not show mere indications or scattered bits of mineralization, but a substantial lode of sulfide mineralization with assays showing high values.

As to the area exposed and sampled after July 23, 1955, the Examiner refused to make findings, and those values were not included in the findings mentioned above.

We are concerned with finding basic facts as distinguished from finding ultimate facts. The reasons for requiring the basic facts to be found is explained in Saginaw Broadcasting Co. v. Federal Communications Commission, 68 USCS Dist. of Columbia 282, 96 F 2d 554 Cert. den. 59 S.Ct. 72:

> p. 559 "The requirement that courts, and commissions acting in a quasi judicial capacity, shall make findings of fact is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra legal considerations; and findings of fact serve the additional purpose where provisions for review are made, of apprixing the parties and the reviewing

tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact, the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

p. 560 "We now rule that findings of fact to be sufficient to support an order, must include what have been described above as the basic facts from which the ultimate facts in terms of the statutory criterion, public convenience interest or necessity are inferred . . . . .

Mr. Justice Douglas has admonished us that, "Unless we make the requirement for administrative action strict and demanding, expertise, the strength of moder government, can become a monster which rules with no practical limits on its dis cretion. Absolute discretion, like corruption, marks the beginning of the end c liberty. This case is perhaps insignificant in the annals. But the standard se for men of good will is even more useful to the venal." New York v. U. S., ICC et al, 342 U.S. 882, 72 S.Ct. 152, 153.

New discoveries of mineral reserves determine the life span of mining comp- anies. The economic rule of prospective profitability adds a heavy burden to th discovery requirement. On the one hand the miner is told you must prove economi

profitability, and on the other is prevented from doing so by fixing the price o metals, e.g., the price of gold was fixed at a 1934 price and the miner is held to strict proof to show with 1955 costs, he can earn a profit.

For the foregoing reason, we respectfully petition this Honorable Court for a rehearing to reverse its decision and to remand this case to the Secretary for a new trial.

Respectfully submitted,

William Braly Murray

William Braly Murray
Attorney for Appellant
525 Failing Building
Portland, Oregon 97204
226-3819

I, William Braly Murray, certify that the foregoing petition for rehearing is in my opinion well founded in law and it is not filed for the purpose of dela that said petition has been prepared in accordance with Rule 32(2) and Rule 40 o the Federal Rules of Appellate Procedure.

William Braly Murray

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